No. 15467

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

H. G. SMITH,

Plaintiff and Appellant,

VS.

W. W. BANCROFT, A. L. BANCROFT,
H. H. BANCROFT and L. A. SICOTTE,

Defendants,

Of whom A. L. Bancroft and H. H. Bancroft are Respondents.

Points and Authorities for Respondent.

WINANS,
of Counsel for Respondents.

SAN FRANCISCO:
PRINTING DEPARTMENT OF A. L. BANCROFT & COMPANY.
1877.

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

H. G. SMITH, *Plaintiff and Appellant*,

vs.

W. W. BANCROFT, A. L. BANCROFT, H. H. BANCROFT AND L. A. SICOTTE, *Defendants*,

Of whom A. L. Bancroft and H. H. Bancroft are Respondents.

Points and Authorities for Respondent.

I.

The promissory note for $1,250, in controversy, upon which Respondents are indorsers, and for the recovery of the amount due whereon they are sought to be held, became due and payable on the 24th day of October, 1874, but was not presented for payment to W. W. Bancroft, the maker and principal debtor, until the 26th day of October, 1874, and no notice of the dishonor of such note was duly given to said indorsers. They were therefore discharged.

1. Respondents were *indorsers* of said note, and not *guarantors*, as claimed by Appellant. The findings show (Trans. fol. 32) that Respondents indorsed the note for the accommodation of the maker, and before it was delivered to the payee, in order to give the note greater credit when negotiated.

Civil Code, Section 3117.
Civil Code, Section 3108.

2. As indorsers, they were entitled to due notice of the dishonor of the note.

Civil Code, Section 3116, subdivision 4.

And being indorsers, they were not guarantors, as claimed by Appellant. Besides, the rule of the Code that guarantors are not entitled to demand or notice, applies only to such parties as are made "guarantors" by the Code, and not to those who were construed such under the former law.

Civil Code, Sections 2807, 2787.

3. The Respondents are discharged because Plaintiff did not present, or attempt to present, the note, for payment, to the maker on the day of its maturity, or employ reasonable diligence in endeavoring to find him, or his place of business, on that day to make such presentation, or present the same on that day at the place where he resided.

Transcript, (Finding 4th) fol. 30.
Transcript, fols. 73, 74, 75.
Civil Code, Section 3131.
Transcript, (Finding 5) fol. 33.

4. The note was payable at San Francisco for two reasons. First. It actually specified that city as the place of payment; and, Second. There the maker resided.

Civil Code, Section 3100.

II.

Plaintiff was not excused from the obligation of due presentment upon any of the grounds specified in the Code, or upon any legal ground whatever.

The only ground upon which such exemption is claimed by Appellant under the Civil Code is that which is assumed to exist under Section 3157 thereof.

Section 3157 of the Civil Code provides that "if an indorser has received *full security* for the amount of an instrument, or the maker has assigned *all* his estate to him as such security, presentment is excused."

It is not pretended by Appellant that the property pledged by W. W. Bancroft to A. L. and H. H. Bancroft constituted in fact *all* the estate of the maker of the said note, nor is there any evidence whatever to that effect. But Appellant, after referring to the guaranty of Mrs. Bancroft made two years before the maturity of said note, without founding any claim upon that, does claim that said property so pledged constituted *full* security for said note.

First. The Court finds that said guaranty, and said property so transferred and pledged, " did not

character of partnership assets, nor relieve it from the priority of claim of partnership creditors upon it.

Parsons on Partnership, 263, 264, 265.

Furthermore, by the agreement, Exhibit "B," it was expressly provided that Respondents should continue, and carry on, the old partnership business, or make business sales of the property.

Transcript, fols. 163, 164.

V.

The Court did not err in denying plaintiff's motion for judgment on the pleadings.

There was no evasion in Respondent's denial of the averment in complaint that "before the maturity of the said note W. W. Bancroft assigned all his estate to A. L. Bancroft and H. H. Bancroft, for the purpose of securing the amount thereof."

This averment was made to literally meet the case provided by the Code.

Civil Code, Section 3157.

From this it appears that to obviate the necessity of presentment it is necessary that all the estate of the maker has been assigned; part will not do; any answer, therefore, which denies that all has been assigned is sufficient, because it specifically denies the very fact upon which, and upon which alone, Plaintiff can recover. It is quite different for a Defendant to deny that he owes Plaintiff a specified sum of money, for he may owe less, and then there would be a cause of action;

or to deny that an act was done at a specified time for it may have been done at another time, and then there would be a cause of action; but, in this case, the property must be the whole or none, and, therefore, to deny that the whole was assigned is to meet the very issue tendered, and upon which alone the Plaintiff is entitled to a verdict.

Finally, it would be difficult, if not impossible, for defendant to make this denial in any more definite form, as it would not be presumably within his knowledge what particular property had been reserved from the assignment.

WINANS,
Of Counsel for Respondents.

No. 5467

IN THE

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State of California.

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VS.

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H. H. BANCROFT,
and
L. A. SICOTTE,
Defendants and Respondents.

Appellant's Brief.

DANIEL TITUS,
Att'y for Appellant.

Filed ________________ *1876.*

________________ *Clerk.*

SAN FRANCISCO:
JOHN F. HUGHES, PRINTER, 605 MONTGOMERY STREET, NEAR CLAY.
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A. L. BANCROFT,
H. H. BANCROFT, and
L. A. SICOTTE,
Defendants and Respondents.

Appellant's Brief.

On the 24th day of October, 1873, W. W. Bancroft executed the note in suit.

At the same time and place he executed three

other notes in the same amount but payable at different dates. The four notes were payable at six, nine, twelve and fifteen months from date to the order of L. A. Sicotte.

The aggregate amount of these four notes was $5000. Each of them was indorsed in blank by A. L. Bancroft and H. H. Bancroft under their firm name of A. L. Bancroft & Co. before delivery and after indorsement were delivered by the maker to the payee Sicotte. The note in suit was the third of the series.

At the same time W. W. Bancroft executed another note in the sum of $2230.80. This note was made payable to A. L. Bancroft & Co.

The first four notes, amounting to $5000, were given to L. A. Sicotte by W. W. Bancroft, for a half interest in certain property and business in which he and W. W. Bancroft were copartners.

The last note mentioned was given to the defendants A. L. Bancroft & Co. for a debt owing to them by a brother of W. W. Bancroft and for which he was not liable.

This transaction as between W. W. Bancroft and A. L. Bancroft & Co. was the indorsement of the four notes amounting to $5000 by A. L. Bancroft & Co. and the execution to them by W.

W. Bancroft of the $2230.80 note. At the same time, and as a part of the same transaction, W. W. Bancroft assigned to A. L. Bancroft & Co. the property and business in which he and Sicotte had theretofore been partners. The object of this assignment as evidenced by the written agreement—Plaintiff's Exhibit " B"—was

FIRST,

to secure A. L. Bancroft & Co. from loss and damage on account of their liability upon the four notes they had indorsed for W. W. Bancroft, and

SECOND,

to secure the payment of the $2230 note.

Upon receiving the assignment of the property above referred to and for the purpose set forth, they, A. L. Bancroft & Co., agreed to pay the four notes when they became due, if they were not paid by W. W. Bancroft.

Under and in pursuance of this contract with W. W. Bancroft, A. L. Bancroft & Co. took possession of the property and business and thereafter and during the three months next ensuing sold the same and collected the debts and received therefrom the gross sum of $8500. $8000 of this amount was paid over to them by W. W. Ban-

croft (see page 48 of Transcript) who had been employed by them to close up the business, and $500 of this amount was received from sales made and money collected by Dorland. (See pages 45 and 46 Transcript.)

The cost and expense to A. L. Bancroft & Co. of closing up this business and collecting the debts was the gross sum of $1500. $600 salary of W. W. Bancroft; expenses of carrying on the business, $750; other expenses, $150: total, $1500. (Page 35 Transcript.)

The first and second of the four notes were paid at maturity. The third—the note in suit—A. L. Bancroft & Co. refused to pay, and they defended plaintiff's action to recover the same on the ground that the note was not presented to the maker and payment demanded on the day it became due.

The note became due at three o'clock P. M. on Saturday the 24th day of October, 1874. On that day the note was at plaintiff's place of business in Sacramento, and was kept there by him till after the hour on which it matured. (See page 21 of Transcript.) It was then transmitted to San Francisco, where it arrived too late in the day for protest. On Monday, the next business day after its maturity, it was duly protested for

non-payment and notice of protest given to A. L. Bancroft & Co.

After receipt of the note the notary made diligent search and inquiry for the maker. He went to his former place of residence and there learned that the maker had removed his residence to Virginia City, Nevada, and that he then resided there. That since the execution of the note the maker had changed his residence and that when it became due he resided in another State.

Were A. L. Bancroft & Co. indorsers or guarantors of the note in suit?

They indorsed the note in blank before its delivery to the payee.

Under the ruling of this Court one who indorses a promissory note in blank before its delivery to the payee is a guarantor.

Rigs v. *Waldo*, 2 Cal. 485.
Clark v. *Smith*, 2 Cal. 605.
Brady v. *Reynolds*, 13 Cal. 31.
Ford v. *Reed*, 34 Cal. 674.
Purce v. *Kennedy et al*, 5 Cal. 139.

Before the Code a guarantor like an indorser was entitled to notice of dishonor. But Section 2807 of the Civil Code changes the rule and

makes the guarantor liable immediately upon default of the principal and without demand or notice. And if A. L. Bancroft & Co. were guarantors of the note in suit they are liable, even though no presentment or demand is shown.

If A. L. Bancroft & Co. were indorsers of the note in suit they are liable without presentment or demand for they were fully secured for the amount thereof.

They held a written guaranty from Anna M. Bancroft (see Exhibit D) and under that guaranty they indorsed the note in suit (see Exhibit C). They also held property assigned to them by the maker, W. W. Bancroft, as security for their liability on this note. (See Exhibit B.) From the property assigned to them by W. W. Bancroft they realized the net sum of $7000, as before shown. This was more than sufficient to constitute full security, and rendered them liable without presentment and demand. See Sec. 3157 Civil Code.

Upon receiving this property A. L. Bancroft & Co. entered into an undertaking to pay this note when it became due. By agreement of the parties a fund was created and the property mentioned in Exhibit B was dedicated and set apart for

the very purpose of meeting these four notes when they became due.

The receiving of money or other property by the indorser of a note upon an agreement that it shall be applied to the payment of the note when it becomes due, dispenses with the necessity of presentment, demand and notice.

Daniels on Negotiable Instruments, vol. 2, pp. 149 and 150 and cases cited.

At the time the note in suit was executed the the maker resided and had his place of business in San Francisco. At the time it became due his residence and place of business were in Virginia City, Nevada. (See pp. 26 and 62 Transcript.)

When the maker of a promissory note moves his residence out of the State where he resided at the time of making the note intermediate the making and maturity of the same the necessity of presentment and demand are excused and the indorser becomes liable on his contract of indorsement without presentment, demand or notice.

American Leading Cases, vol. 1, 215.
Magruder v. *The Bank of Washington*, 9 Wheat. 598.
Gist v. *Lybrand*, 3 Ohio, 307, 319.

Foster v. *Julian*, 24 New York, 28.
Anderson v. *Drake*, 14 Johnson, 114.
Demme v. *Walker*, 7 N. H. 199.

The note in suit is payable generally; that is no place of payment was appointed by the parties.

It was made payable "At the Banking House of   in this City."

The blank left for the name of the banking house to be written in was never filled, and the words following "in this City" were intended as an abverbial phrase, to relate to the name which should be written into the blank left for that purpose.

As the parties did not nominate a bank at which the note should be paid, the effect of the omission was to make the note payable wherever it was held at maturity.

Section 3100 of the Civil Code as it stood at the time the note in suit was executed, provides that "A negotiable instrument which does not specify a place of payment is payable wherever it is held at maturity." While this provision of law remained in force, if the parties to the note omitted to appoint a place of payment, the law itself made the appointment.

The note in suit was held at the Odd Fellows' Bank in Sacramento (page 21, Transcript) on the day and hour it became due. The law appointed that place, the place of payment.

If a note be kept at the place of payment on the day it becomes due this is a sufficient presentment and demand.

Daniels on Negotiable Instruments, vol. 1, 470.
Nichols v. *Goldsmith,* 7 Wend. 160.

Notice of dishonor was duly given on the next business day, to wit, October 26th.

The Court erred in permitting the witness, A. L. Bancroft, to testify that the note of $2230 had priority of payment, and that the agreement of the parties was that it was to be first paid. This contradicted the written contract.

The contract, Exhibit B, was in evidence, and it showed the order in which the notes were to be paid.

It showed that the object and purpose of the parties was *First,* to secure the payment of the four $1250 notes. The payment of the $2230 note was deferred to the other four. It was the *Second* object of the assignment and while it be-

came due first in point of time, by agreement of the parties the fund provided was not to be applied to the payment of this note till the others had been paid. The reasons for this arrangement are apparent. The last note mentioned was a note given for a debt that W. W. Bancroft did not owe. So far as the evidence goes he had voluntarily assumed to pay a debt owed by another and for which he was not legally or morally bound. The other four notes were his own debt and to secure the payment of this debt was the first object of providing this fund.

The ruling of the Court was clearly error.

The Court erred in permitting the witnesses W. W. Bancroft and A. L. Bancroft to testify that A. L. Bancroft & Co. applied this fund to purposes other and different than those agreed upon by the parties—that other debts were paid by them and the fund thereby exhausted.

It was held by the Court below that the debts thus paid by them in violation of their agreement were a lien or charge upon the property assigned to them and that the assignment was made subject to this lien. There is not a particle of evidence in the record to support this ruling.

The evidence shows that the debts thus paid

were debts contracted by W. W. Bancroft & Co. before the assignment was made—that at the time the assignment was made W. W. Bancroft owed sundry persons debts amounting to $2800 to $3000. There was no evidence to show that those debts were a lien on this property. The creditors were creditors at large and they had no species of lien on this property. The evidence was immaterial and irrelevant, and in no wise relieved the defendants from their liability on the note in suit.

The liability of a simple indorser is collateral. He undertakes to pay upon conditions, and if those conditions are not performed he never becomes liable. But when a simple indorser receives money or property upon an agreement to pay the note himself when it becomes due, his liability changes to that of an original promisor. (Daniels on Negotiable Instruments, vol. 2, 149.) Now when A. L. Bancroft & Co. received the property and entered into the undertaking " Exhibit B" they were liable as original promissors. The misappropriation of this fund or its diversion to other purposes in no wise affects their liability.

The Court erred in denying plaintiff's motion for judgment on the pleadings.

The allegation in the complaint that before the

maturity of the said note W. W. Bancroft assigned all his estate to A. L. Bancroft and H. H. Bancroft for the purpose of securing the amount thereof is not traversed in the answer.

The attempted denial is literal and evasive.

"The rules of pleadings under our system are intended to prevent evasion, and to require a denial of every specific averment in a sworn complaint in substance and in spirit and not merely a denial of its literal truth, and whenever the defendant fails to make such denial he admits the averment."

Doll v. *Good,* 38 Cal. 290.
Shepard v. *McMill,* 38 Cal. 72.
Smith v. *Richmond,* 15 Cal. 501.
Blankman v. *Vallejo,* 15 Cal. 638.
Castro v. *Witman,* 16 Cal. 380.
Haggins v. *Wortel,* 18 Cal. 333.
Woodworth v. *Knowlton,* 22 Cal. 161.
Landers v. *Bolton,* 26 Cal. 292.
Camden v. *Mullen,* 29 Cal. 564.
Blood v. *Light,* 31 Cal. 115.
DeGodey v. *Godey,* 39 Cal. 166.
Heuston v. *T. & C. C. L. R. Co.* 45, 550.

If the denial of an allegation be couched in such language that it may be true and at the same

time the allegation in essential substance may also be true, it is evasive and insufficient.

Doll v. *Good,* 38 Cal. 290.

The case at bar is in point . . . .

Upon the trial of the case if the plaintiff shall prove a general assignment of the maker's estate and that that assignment embraced all the property of the maker to which the indorsers could have looked for indemnity in the event they had been compelled to pay the note I apprehend the allegation would have been proved.

On the other hand, if the defendants could have shown that there was reserved from the assignment any article of household furniture or any portion of the wearing apparel of the maker or anything whatever that belonged to him the denial would also have been sustained.

If this allegation in the complaint is not denied, or if the denial is evasive, the plaintiff's motion should have been granted.

DANIEL TITUS,
Att'y for Appellant.

S. F

3 items

No. 5464

IN THE

SUPREME COURT

OF THE

State of California.

H. G. SMITH,

Plaintiff and Appellant,

vs.

W. W. BANCROFT,
A. L. BANCROFT,
H. H. BANCROFT,
and
L. A. SICOTTE,

Defendants and Respondents.

Transcript on Appeal.

CARR & TITUS,
Attorneys for Appellants,

WINANS & BELKNAP,
Attorneys for Respondents.

Filed .... *1876.*

.... *Clerk.*

SAN FRANCISCO:
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1876.

INDEX.

1 # In the Supreme Court

OF THE

STATE OF CALIFORNIA.

In the District Court of the Fourth Judicial District of the State of California, in and for the City and County of San Francisco.

2

H. G. SMITH,

Plaintiff and Appellant,

vs.

W. W. BANCROFT,
A. L. BANCROFT,
H. H. BANCROFT, and
L. A. SICOTTE,

Defendants and Respondents.

3

Complaint.

The plaintiff H. G. Smith in the above entitled action, complains of the defendants herein and for cause of action alleges

That on the 24th day of October, 1873, the de-

4 fendant, W. W. Bancroft, executed his promissory note in the words and figures following, to wit :

$1250. San Francisco, October 24th, 1873.
On the 24th day of October 1874 at three o'clock P M of that day without grace I promise to pay to Mr. L. A. Sicotte or order Twelve hundred and fifty dollars at the banking house of
in this city, with interest at the rate of one per cent. per month from date until paid : Principal and interest payable only in gold coin issued from
5 the mints of the Government of the United States for value received. W. W. Bancroft.

That at the same time and place the defendants A. L. Bancroft and H. H. Bancroft indorsed the said note under the name and style of A. L. Bancroft and Co. and delivered the said note so indorsed to the defendant L. A. Sicotte.

That at the said time the said defendants A. L. Bancroft and H. H. Bancroft were partners and
6 were doing business under the said name and style of A. L. Bancroft and Co.

That afterwards and before the maturity of said note the said defendant L. A. Sicotte for a valuable consideration indorsed the said note and delivered the said note so indorsed to the said plaintiff who is now the owner and holder thereof.

That at the time the said note was executed as aforesaid the said defendant W. W. Bancroft re-

7 sided and had his place of residence and business
in the City of San Francisco.

That afterwards and before the maturity of the
said note the said defendant W. W. Bancroft re-
moved from the said City and from the State of
California and at the time the said note became
due the said defendant W. W. Bancroft had no
residence or place of residence and no business or
place of business in said City of San Francisco or
in said State of California and that at the said
8 time the said defendant's residence and where-
abouts were unknown to this plaintiff.

The plaintiff further complaining alleges on his information and belief that before the maturity of the said note the said defendants A. L. Bancroft and H. H. Bancroft received full security for the amount thereof.

And the plaintiff further alleges on his informa-
tion and belief that at the said time the defendant
W. W. Bancroft assigned all his estate to the
9 said A. L. Bancroft and H. H. Bancroft for the
purpose of securing the said amount.

The plaintiff further alleges that the said W. W. Bancroft did not pay the said note at its maturity nor did any one pay the same for him or on his behalf of all of which the defendants A. L. Bancroft, H. H. Baneroft and L. A. Sicotte had due notice. That said note was duly protested on the 26th day of October, 1874, for non payment and that the costs of protest thereof were Five dollars in gold coin.

10 That said note is now due and that no part thereof has been paid.

Wherefore plaintiff demands judgment against the said defendants for twelve hundred and fifty dollars and interest from the 24th day of October, 1873, and for costs of protest and costs of suit and that the judgment may be made payable in gold coin.

CARR & TITUS,
Att'ys for Plaintiff.

11 STATE OF CALIFORNIA, }
City and County of San Francisco. } ss

H. G. Smith being duly sworn deposes and says that he is the plaintiff in the above entitled action, that he has read the foregoing complaint and knows the contents thereof, and that the matters therein stated are true of his knowledge, except as to those matters stated on information or belief, and as to those matters he believes it to be true.

H. G. SMITH.

12

Subscribed and sworn to before me, this 25th day of January, 1875.

D. K. SWIM, Notary Public.

[Seal.]

Indorsed—Filed January 25th, 1875.

WM. HARNEY, Clerk.
By Wm. Ledlie, Dep. Clk.

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13 ## Answer.

[Title of Court and Cause.]

Now come the defendants A. L. Bancroft and H. H. Bancroft and for their separate answer and defence herein they and each of them

Deny that they or either of them indorsed and delivered or that they or either of them indorsed or delivered the note mentioned and set forth in the complaint to the defendant L. A. Sicotte, but
14 they allege and aver that they indorsed the said note solely for the accommodation of the defendant W. W. Bancroft, the maker thereof, and that they delivered the said note so indorsed to the said W. W. Bancroft and not to the said defendant L. A. Sicotte nor to any other person whomsoever.

They and each of them deny on information and belief that after the said note was executed or before the maturity thereof the said defendant W. W. Bancroft removed from the said City and
15 County of San Francisco or from the State of California.

They and each of them deny that at the time the said note became due the said defendant W. W. Bancroft had no residence or place of residence in said City and County of San Francisco or in said State of California.

They and each of them deny that at said time

16 to wit: at or after said note was executed or at the time the same become due, the residence of the said defendant W. W. Bancroft was unknown to the plaintiff, on the contrary they and each of them aver on information and belief that at the time of making said note and thereafter and at the time of the same becoming due the plaintiff had knowledge of the residence of said defendant W. W. Bancroft, and they and each of them further aver that if the plaintiff was ignorant of the residence of said W. W. Bancroft by the exercise of reasonable diligence and by simple inquiry in quarters which were of the easiest access he could
17 readily have acquired knowledge of the residence of said defendant W. W. Bancroft.

They and each of them deny that before or since the maturity of the said note or at any time the defendants A. L. Bancroft and H. H. Bancroft or either of them received full security for the amount thereof.

They and each of them deny that at the same time or at any time the defendant W. W. Bancroft
18 assigned all his estate to the said A. L. Bancroft and H. H. Bancroft or to either of them for the purpose of securing said amount or otherwise.

These defendants and each of them deny that they or either of them had due notice or any notice given within the proper legal time, or which constituted legal notice, of the fact that said note

19 was not paid at maturity or that said note was not paid.

They and each of them deny that said note was duly protested for non-payment or otherwise or that the same was duly protested for non-payment or otherwise on the 26th day of October, 1874, but they and each of them aver that the said note was not presented to the maker for payment or otherwise if at all until the 26th day of October, 1874, which day was Monday, and that
20 notice of presentment of said note for payment was not given to these defendants or either of them if at all till said Monday the 26th day of October, 1874, although the said note became due and should have been presented to the maker for payment on Saturday the 24th day of October, 1874.

They and each of them deny that said note or any part thereof is now due against them these defendants or either of them.

21 And for a further answer and defense these defendants allege;

That they indorsed the said note mentioned in the Complaint for the accommodation of the said W. W. Bancroft and that there was never any value or consideration for the indorsement or the payment of said note by these defendants or either of them.

That as they are informed and believe the said

22 note was indorsed to the plaintiff and he always held the same without any value or consideration.

And for a further and separate answer and defense these defendants aver that the said promissory note was not duly presented for payment and that the same was not duly protested for non-payment and that due notice of the alleged or any dishonor of the said promissory note was not given to these defendants or to either of them.

23 They further aver that due search was not made when the said promissory note became due and payable to discover the residence or person of the said W. W. Bancroft the maker thereof at San Francisco or elsewhere in order that the said note might be presented to him the said maker thereof.

They further aver that said promissory note by its terms became due and matured on the 24th day of October, 1874, and that the same was not
24 duly or at all presented for payment on that day.

They further aver that notice of the dishonor of said promissory note on said 24th day of October, 1874, was never given to these defendants or to either of them.

Wherefore these defendants thus separately appearing and answering pray to be herein dis-

25 missed with their costs and charges in gold coin of the United States.

WINANS & BELKNAP,
Att'ys for Defendants, A. L. Bancroft
and H. H. Bancroft.

STATE OF CALIFORNIA, } ss
City and County of San Francisco, }

H. H. Bancroft, being duly sworn, deposes and says, on oath, that he is one of the defendants who
26 make the foregoing answer in the above entitled cause, that he has read the foregoing answer and knows the contents thereof, and that the same is true, of his knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

H. H. BANCROFT.

Subscribed and sworn to before me, this 8th day of March, A. D. 1875.

J. W. CONNER, Notary Public.

27 [Seal,]

Service per copy of the within is admitted at San Francisco, this 8th day of March, 1875.

CARR & TITUS,
Att'ys for Pltf.

Indorsed—Filed March 8th, 1876.
WM. HARNEY, Clerk.
By Jas. E. Ashcome, Dep. Clerk.

28 ## Findings.

[Title of Court and Cause.]

In this cause, W. W. Bancroft, the maker and L. A. Sicotte, the payee of the promissory note which was the subject of the action were not served with summons and have not been brought into Court. A. L. Bancroft and H. H. Bancroft who indorsed the said note in blank and are made defendants were served with summons and copy
29 complaint and separately answered by severing in their answer from the other defendants. By consent of parties a jury was waived and the case was tried by the Court on the 13th day of April, 1876, by the plaintiff against the said defendants, A. L. and H. H. Bancroft.

From the evidence introduced upon the said trial on behalf of plaintiff and defendants the Court finds the following facts.

30 ### Findings of Fact.

1. That on the 24th day of October, 1873, defendant W. W. Bancroft made the promissory note in complaint described, with the indorsement of A. L. Bancroft and H. H. Bancroft made under the partnership name and style of A. L. Bancroft & Co., thereon and delivered the said note so indorsed for value to defendant L. A. Sicotte the payee thereof.

2. That afterwards and before the maturity of

31 said note said L. A. Sicotte, transferred and delivered said note for a valuable consideration, to wit, in payment of a precedent debt to the plaintiff who is the lawful owner and holder thereof.

3. That prior to the delivery of said note to said Sicotte by said W. W. Bancroft, the said defendants indorsed the same, as above found, in blank and for the accommodation of said W. W. Bancroft, not being indebted to him nor receiving any consideration therefor but only for the pur-
32 pose of giving greater credit to said note when it was negotiated by said W. W. Bancroft and with knowledge that the latter intended to transfer it to said L. A. Sicotte for value.

4. That the apparent maturity of said note was the 24th day of October, 1874; that said note was made, indorsed and delivered in the City and County of San Francisco; that at the time of the said making and indorsement the said maker, W. W. Bancroft, resided and carried on business in said City, and no evidence was introduced showing that he did not continue to reside and carry
33 on business in said City, at the time of the apparent maturity of said note.

5. That on the day of the apparent maturity of said note, to wit, the said 24th day of October, 1874, it, said note was not presented nor was any attempt made to present it to the said W. W. Bancroft the maker and principal debtor for payment by plaintiff who was then the holder thereof,

nor was any attempt made by the said holder to
find the said W. W. Bancroft, in the said City
and County or elsewhere, or to find his place of
34 business or residence or to present it for payment
at such place of business or residence.

6. That at the time of indorsing said note as
aforesaid and as security for said indorsement, and
certain other indorsements made at the same time
by them and as security for the payment of an-
other promissory note the said defendants A. L.
& H. H. Bancroft received from the said W. W.
35 Bancroft a transfer and pledge of certain goods
belonging and debts owing to, said W. W. Ban-
croft, which transfer and pledge were made under
and by virtue of a written contract from said W.
W. Bancroft to said A. L. and H. H. Bancroft
then made and subject to the conditions and pro-
visions thereof. That said contract was intro-
duced in evidence and marked Plaintiff's Exhibit
B, a copy whereof is hereto annexed and made a
part of these findings.

7. That the goods and debts so transferred and
36 pledged to said defendants A. L. & H. H. Ban-
croft and the guaranty hereinafter mentioned did
not constitute full security for the amount of the
said note here sued on and did not prove to be
any security therefor, that said defendants A. L.
& H. H. Bancroft realized from the sale of the
said goods and the collection of said debts all the
money that could be realized therefrom by a pru-
dent and reasonable management and disposal of

37 said goods and collection of said debts; that the amount of indebtedness intended to be secured to said defendants A. L. and H. H. Bancroft was $7300 principal and interest thereon; that they only realized from the sale of said goods and collection of said debts a net sum of $3507 over and above the necessary expenses and disbursements attendant upon said sales and collections together with certain legal claims against the same requiring to be paid and which they did pay, that said sum of $3507 was insufficient to reimburse said
38 defendants for the amounts of money already paid by them in discharge of the accommodation indorsements they had otherwise made under and in pursuance of said contract and of the other promissory note hereinbefore mentioned and therein described and that the said goods and debts so pledged and transferred to said A. L. & H. H. Bancroft never constituted full security nor served as any security at all for the amount of the note here sued on or any part thereof.

39 That the said note and three other notes each of the same amount made by the said defendant W. W. Bancroft and made payable to the defendant Sicotte, and indorsed by the defendants A. L. Bancroft and H. H. Bancroft, and particularly described in plaintiff's exhibit "B" were made, indorsed and delivered, in payment of the sum of $5000, which sum of $5000 the defendant W. W. Bancroft paid as aforesaid to the defendant Sicotte for one half of the property and business mentioned and described in the said Exhibit B, which exhibit is hereto attached and made part hereof.

40 That when the indorsement of the said note by the defendants A. L. Bancroft and H. H. Bancroft, was made, the said defendants held a written guaranty made and executed by Anna M. Bancroft, October 7th, 1872, which guaranty was introduced in evidence by plaintiff and was marked exhibit "C," which is hereto attached and made a part hereof, and held the written assignment of the maker of the said note W. W. Bancroft, to the said defendants A. L. Bancroft and H. H. Bancroft of certain personal property mentioned
41 and described in the said assignment, Exhibit "B."

That the said property was assigned by the said defendant W. W. Bancroft to the said defendants A. L. & H. H. Bancroft for the purpose of securing them for their indorsement of the said notes.

That the said note became due and matured on the 24th day of October, 1874; that at the said time the said notes were held at the City of Sacramento in the said State of California.
42

That it was kept by the said plaintiff at the said place during the business hours of the said 24th of October and afterwards and on the same day was transmitted to the City and County of San Francisco, the place of residence of the said defendants A. L. & H. H. Bancroft, and on the next business day to wit, Monday the 26th day of October, 1874, notice of non-payment and dishonor was given to A. L. & H. H. Bancroft.

43 That the whole amount of the notes to secure the payment of which the said property was assigned was $7230—

That the said note has not been paid.

From the foregoing facts the Court derives the following

CONCLUSIONS OF LAW.

1. In order to bind the defendants A. L. &
44 H. H. Bancroft and render them liable the note which is the subject of this action it was necessary for plaintiff the holder to present or endeavor to present the note for payment on the day of its apparent maturity to the maker unless excused by law, and no such presentment was made or attempted to be made, and no such excuse was shown in evidence.

2. The transfer of the goods and debts mentioned in the said contract hereto annexed did not constitute and the defendants A. L. & H. H.
45 Bancroft did not receive from W. W. Bancroft full security for the amount of the note in controversy.

3. The said defendants A. L. & H. H. Bancroft are entitled to a judgment.

R. F. MORRISON, Judge.

"Endorsed" Amended Findings of Defendants.
A. L. & H. H. Bancroft.

46 Filed Nov. 2nd, 1876.

Thos. H. Reynolds, Clerk,
By Wm. Ledlie, Dep. Clk.

Judgment.

[Title of Court and Cause.]

47

Nov. 10th, A. D. 1876.

This cause came on regularly for trial Messrs. Carr & Titus appearing as counsel for the plaintiff, and Messrs. Winans & Belknap for the defendants. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the Court sitting without a jury; Whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined, the evidence being closed, the cause was
48 submitted to the Court for consideration and decision, and after due deliberation thereon, the Court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged and decreed that H. G. Smith, plaintiff do take nothing by this action as against W. W. Bancroft, A. L. Bancroft, H. H. Bancroft and L. A. Sicotte, defendants,

49 but that judgment be and hereby is entered in favor of said defendants and against said plaintiff, together with said defendant's costs and disbursements incurred in this action amounting to the sum of $45.00.

Recorded November 10th, 1876, Book M, page 420.

50

Notice of Motion for New Trial.

[Title of Court and Cause.]

Take notice that the above named plaintiff will move this Court, at the Court room of said Court, in the said City and County, for an order of the said Court vacating the judgment of this Court rendered in this cause on the 13th day of April,
51 1876, and for a new trial in the above entitled action on the following grounds, to wit:

First: That the evidence is insufficient to justify the decision of the said Court.

Second: That the said decision and judgment are against law.

Third: Of errors of law occurring at the trial, and excepted to by the said plaintiff.

52 The said motion will be made on a statement of the case to be prepared, and upon the papers on file in the said action.

CARR & TITUS,
Att'ys for Pltf.

To WINANS & BELKNAP,
Att'ys for Defendts.

Dated April 20th, 1876.

Service per copy accepted this 20th day of
53 April, 1876.

WINANS & BELKNAP,
Att'ys for Dfdts.

Statement on Motion for a New Trial.

[Title of Court and Cause.]

54 The following constitutes in substance all the evidence upon the trial.

H. G. SMITH, sworn and examined on behalf of the plaintiff, testified :

I am plaintiff in this suit, and know the defendants and each of them.

The note in suit first came into my possession about the middle of November, 1873. I received it from Mr. Sicotte. It was taken from him for

55 its face value of $1,250, as part payment of a debt owing me, and no part of it has been paid. When the note became due my place of business was at Sacramento, as it is at present. I am a manufacturer of flour and a director in a bank.

When this note became due it was at Sacramento at my place of business. A few days before it was due it was left at the bank for collection. It was at the bank on the day it became due. At that same day at about four o'clock in
56 the afternoon I transmitted it to San Francisco for collection. It was sent to the California Trust Company by the Odd Fellows' bank. The Odd Fellows' bank does business with the California Trust Company.

It was sent here to have it protested on that day, Saturday the 24th day of October, 1874. At the time I took the note Sicotte owed me over $7000. Four notes were given me at that time for $1250 each. This is one of them.

57

W. W. Bancroft was the maker. Mr. Sicotte the payee, and they were all endorsed by A. L. Bancroft & Co. Sicotte was doing business with W. W. Bancroft at the time these notes were given. They were in the cigar and tobacco business on Clay street in this city. Sicotte's interest in said business was one half interest. W. W. Bancroft had the same.

58 *Cross Examination.*

The Odd Fellows' Bank sent the note to the California Trust Co. I gave it to the Odd Fellows' bank. I am a director in the said bank and do my business with it. A few days before the note in suit became due I gave it to the said bank and at four o'clock in the afternoon on the day it became due the bank sent it to this city.

It started from Sacramento on that evening.
59 It did not arrive here until half-past nine in the evening of that day. I presume it was not presented on that day. It was protested on the ensuing Monday, the 26th. At that time it was placed in the hands of the notary, Mr. Swim, who protested it. I don't see how it could be presented to the maker on Saturday.

The note was then placed in evidence and marked Exhibit A and is hereto attached and made a part hereof.

60 L. A. Sicotte was next examined as a witness for the plaintiff. Being sworn he testified as follows.

I am one of the defendants in this action but no summons has been served on me. I have known the plaintiff since 1867. I think I have known the defendant W. W. Bancroft two and one half or three years. I am the L. A. Sicotte named as payee in that note. At the time this note was executed, on the 24th day of November, 1873, three

61 other notes were executed by the same party for the same amount. All those notes were endorsed by A. L. Bancroft & Co. No other than these four notes were executed to me on that day by W. W. Bancroft nor did he at any other time execute any other notes to me but these. These four notes of $1250 each were given to me for my half interest in the tobacco and cigar business on Clay street. I was the partner of W. W. Bancroft at the time in the tobacco and cigar business.

62 He bought me out and I took these four notes for my interest. As far as I can remember from the statement of the books my half in the said business was about $8000 or $9000. And it was worth fully as much and more too than these four notes were given for. I sold to W. W. Bancroft at that time my half interest for $5000. My property at that time consisted of tobacco, cigars and some assets on the books. I have no definite recollection as to how much tobacco and cigars were worth. It is so long ago that I could not get at it approximately so as to segregate between
63 it and the book debts. I took an inventory while we were in business. I think I was in business with W. W. Bancroft between four and six months. As far as I can remember the amount I paid in myself as capital was in the neighborhood of $3000. I don't know how much W. W. Bancroft paid in. He did not put in as much as I did. I transferred these four notes to H. G. Smith. I don't remember when they were transferred. It was within six weeks after they were executed.

64 *Cross Examination.*

I was doing nothing when I started that business. When I started it I was doing business on Clay street. I did not transfer part of the stock in the store. I and W. W. Bancroft did not start a saloon any where. I had no connection with any saloon or any other business. Mr. Bancroft was in partnership with another person. I had nothing to do with it except loaning some money to Mr. Bancroft for that saloon. I had no inter-
65 est in the saloon. I loaned him individually some money. There was some cigar stand that was carried on for the house on Market street I remember now. The house furnished the stuff for that. I do not know what was the value of the stock. Some of that stock was taken from the store on Clay street. Could not tell whether the whole or not.

Plaintiff next read in evidence a written assignment made by W. W. Bancroft to A. L. & H. H. Bancroft of the property and business of W. W.
66 Bancroft on Clay street a copy of which is hereto attached and made part hereof and is marked Exhibit A.

T. A. C. Dorland was next called as a witness for the plaintiff. Being sworn, he testified as follows:

I am cashier of A. L. Bancroft & Co. and I and Mr. A. L. Bancroft conduct the correspondence of the house in reference to the finances. I

67 wrote that letter. The letter was put in evidence
and marked Plaintiff's Exhibit "C." A paper
was shown the witness. That is a copy of the
guaranty I referred to in the letter. I suppose
the H. G. Smith to whom this letter was ad-
dressed is the plaintiff in this suit.

Plaintiff then offered in evidence the written guaranty marked Exhibit "D."

D. K. Swim called as a witness for the plaintiff
68 being sworn testified as follows :

I am a notary public and dealer in real estate
and general agent. I was notary public amongst
other things on the 26th day of October, 1874. I
protested the notė in suit. That is the protest.
I received this note on the 26th day of October,
1874. I received it I think about half-past nine
o'clock in the morning, if I recollect right. It
may have been about nine. I know it was pretty
early in the morning. Upon receiving the note I
went immediately in search of Mr. W. W. Ban-
croft. I went in the first pla I think I made
69 inquiry at the place of business of A. L. Bancroft
& Co. I then went where I had found him be-
fore where he had formerly resided on Bush
street. I don't remember the number. I remem-
ber that on several of these notes I had to travel
around a great deal. I remember on one partic-
ular note I had to travel upwards of half a day.
I was going to say that I had several of those
notes to protest and this one was one, and I was

70 going to say in reference to one of them, I am not certain whether this was the one or not, but I think it was, I traveled round half a day trying to ascertain the place at that time the place of residence or business of W. W. Bancroft. I did not succeed in finding him. I went to his former place of residence on Bush street, and I enquired of the landlady of the house if he was there at that time and she said he was not, that he was in Virginia City, and I presented the note to her and demanded payment. I was informed there that
71 his place of residence was in Virginia City at that time; that was all I could get at that time; I could not find either his residence or place of business; then I wrote a note of protest and presented it at the place of business of A. L. Bancroft & Co. That same day I think before twelve o'clock. I am quite certain before twelve o'clock. I want to say with reference to the note I was speaking of where I had traveled round over half a day. I traveled round with reference to one of these notes, and I think it was with reference to this
72 one some considerable time after I delivered the protest for the purpose of ascertaining whether he was in the city or not; the notice of protest I have not seen here yet; this is the protest. I delivered the protest to A. L. Bancroft. I think either to A. L. Bancroft or to Dorland. I am inclined to think I delivered it to A. L. Bancroft at their place of business on Monday the 26th of October, 1874, before twelve o'clock.

73 *Cross Examination.*

I am positive I made the inquiry in the morning; a part of the inquiry was made I am certain not less than half-past ten o'clock; I believe the note was due on the 24th. I know there was one of these given to me after it was due; this was given to me after it was due. It was given to me the 26th. One of the tellers of the National Gold Bank and Trust Co. J. L. Stevens gave it to me. I think it was
74 Saturday night he came to me and told me there was a note coming down from Sacramento by Wells, Fargo & Co. to be protested but from some cause or other, I think the mistake of the Odd Fellows' bank up there I think he said; I am quite certain he said it had not been sent before; he wished I would be on hand so I could get it and I staid round until about nine o'clock after the express came in anyhow, and he said he would not be able to get it that night. He requested me to be round early the next morning, and I think I was at the bank not more than half an
75 hour after the bank was open. It was eight o'clock in the morning; certainly not later than nine o'clock in the morning I was there and obtained the note. This was Monday the 26th; the day of the maturity of the note was Saturday the 24th; that is my recollection; I went there early and obtained the note and proceeded to protest it as I have described.

76 Plaintiff then put in evidence the protest marked Exhibit "E."

Mrs. Kate Sanford called as a witness for the plaintiff, being sworn testified:

I reside at No. 334 Bush street. Have resided there about three years. I know the defendant W. W. Bancroft, and have known him about three years; he has lived with me. He lived in our house—came to our house sometime in 1873. I do not remember the month of the year; it was
77 in the summer time; he remained with us till 1874; it was in the summer of 1874 I think when he left; I don't know where he went; he roomed in our house from 1873 to 1874; he has never roomed with me since; do not know where he was in October, 1874; I do not know whether he was in the city or not.

Plaintiff rested.

78

Testimony for the Defendants.

A. L. Bancroft sworn for the defendants, testified:

I am one of the firm of A. L. Bancroft & Co. who were the indorsers of this paper; this is the transfer—showing it—to W. W. Bancroft to my

79 firm; it was made on our indorsing certain promissory notes for him, to us as security; it was given to us at the time of our indorsing some promissory notes for him. It was given to us as security. It speaks of a certain other note besides this that we were to indorse; that is a note that he gave us for the note that we held against his brother. This was included with the others. The one he gave us in lieu of the one that we held against his brother had priority of payment; that came due before the others did, and that was
80 to be paid first; this was given to us as temporary security, expecting to receive other security for the indorsement that we gave him; it was expected that we would receive the mortgage upon some property that his mother had in Portland, Oregon. The agreement calls for our carrying on the business to a certain extent; in regard to the paper that was designed to secure any indebtedness which the brother of W. W. Bancroft owed us, it was an accommodation paper on our part. The indorsement of our firm was placed on that
81 paper before it was negotiated, for the purpose of enabling it to be negotiated; the indorsement was made before it was delivered to Mr. Sicotte, the payee as an accommodation paper to give it credit in the market; I was going to derive no benefit from this transaction; we did not get any consideration at all for our indorsement except this security; after this agreement was executed we took possession; the business of our house, books and stationery, was different from this; we were not familiar with this kind of business. We were

82 familiar with business generally, but not this particular business. The store was on Clay street in this city; we carried on the business for a time expecting to receive other security than which we held; failing to receive that security and giving up the hope of getting it after having some expenses with reference to it, and the business proving that it could not be carried on successfully we then proceed to close it; we had correspondence with Mrs. Bancroft; the fact simply is that we were satisfied we were not going to receive any
83 other security than that; that we were not going to receive the mortgage we expected to receive; W. W. Bancroft acted as our representative in carrying on the business; he carried it on; he went on and made sales from day to day and ultimately accounted to us; the net amount that we received was $3500. That was realized from the property that was assigned to us; that went to the credit of these items that was secured by this agreement; there were other debts, business debts that existed against that property which had to
84 be paid. I don't know as I can testify as to the amount of them as definitely as some one else; there were heavy debts existing, firm debts against that property which that business had to pay. There were partnership debts existing at that time against the business; there were efforts made to enforce those debts by process of attachment against this property; those debts were paid out of the proceeds of this property: I don't know the amount definitely. I have a general idea when

85 I spoke of this amount netting the sum of $3000 and odd dollars I meant over and above the debts —$3500 in cash. In the agreement it is provided that they shall be secured by that property so far as it constitutes a security; the payment of the four notes that were given endorsed by us and each for $1250 and also the payment of the other note for $2230 with interest on that and on all of them; this amount of $3500 in round numbers was all that our firm received in payment of this indebtedness thus secured; for we had received
86 this security—we continued in business about 3 months—It is a very difficult question to answer what would the property have sold for if sold at once after the security was given. It would have been almost impossible to have sold it out immediately, because the property was largely of debts due the firm and upon attempting to collect we found it impossible to do so except in a very small proportion.

I cannot testify so definitely as some other wit-
87 nesses as to what the goods were worth. I think it is very doubtful if we could have sold the property and the goods and the assets for more than $2500. I think nobody would have bought them, or with great difficulty. I do not know the amount of the debts. These debts being against corner groceries, and keepers of saloons and of cigar stands—a class of people whom it was difficult to collect and realize money from; the property that was transferred consisted of $8000 debts

88 due the firm and some stock on hand—the stock on hand was cigars and tobacco.

Cross Examination.

I am not quite sure whether I or any one else at the time this assignment was made took an inventory of that property. There was one taken a short time afterwards, after it came into our possession. I can't testify exactly by whom it was taken. We were represented in the inventory.
89 The consideration of that note of $2300 was the note given by W. W. Bancroft but which was taken up at that time. I think that W. W. Bancroft was never liable on the old note made by his brother. I don't remember that he was. I closed the business by private sale under the direction of Mr. Dorland, our cashier. He had more to do with it than any one else. He knows all about it About $3500 was received by me as the net proceeds of the sale of this property. Mr. Dorland had charge of collecting the outstanding indebtedness that was collected. W. W. Bancroft collect-
90 ed some portion of it.

He didn't collect money that he didn't account for that I know of. I do not know that he collected money that was not paid over to us; but in attempting to make these collections I don't remember when we had come across any cases where he had done so and not reported it to us. He did not do all the collecting; he did a very small part of it; almost none of it. There are

91 some debts remaining ; we have been unable to get anything out of them; we have tried very hard. I don't know any property that we could get it out of. I think we have got every dollar out of it that we can get. I don't know how we can get another dollar out of it. I think it would cost more to get any more out of it than we would realize. I don't know the amount of the debts owing by this firm W. W. Bancroft & Co. I know in a general way there was debts due for goods and money due the bank.

92

I don't know the amount nor to whom the debts were due. I did pay out of the proceeds of the sale of this property some of the debts. The amount I don't know. There are others can testify more definitely to that than I can. I cannot tell it definitely.

Re-direct Examination.

W. W. Bancroft was not liable on the note of his brother, but he gave a new note of his own
93 and this security was for his own debt.

The testimony of the witness A. L. Bancroft as to the payment of the note for $2230.00 was taken under the objection of plaintiff that the written assignment showed the order in which the notes were to be secured and were to be paid and the writing could not be contradicted or varied by parol evidence and was itself the best evidence. The objection was overruled by the Court to which ruling the plaintiff excepted. The testimony of

94 the same witness as to the firm debts of W. W. Bancroft & Co. that A. L. & H. H. Bancroft paid out of the proceeds of the property assigned by W. W. Bancroft was taken under plaintiff's objection that it was irrelevant and immaterial. The objection was overruled by the Court and the plaintiff excepted.

W. W. Bancroft was next called as a witness for the defendants. Being sworn he testified as follows :

95

I am the party who made this conveyance or assignment to A. L. Bancroft as security for these notes. This assignment was made I believe on the same day of the sale of Mr. Sicotte's interest to me. It was a half interest. When I had transferred the property mentioned in the instrument to Mr. Bancroft the debts were $\frac{2}{3}$ of all that was transferred for this security about $\frac{1}{3}$ would be the stock. After that transfer the business went on. I conducted the business—at least had control of it under A. L. Bancroft & Co. I carried on that business for about 3 months I
96 think. During that time the sales went on regularly as before. Nothing was sold at auction. I sold the goods for the highest value they would bring and for what they were worth. I collected as much money from the debts as could be collected. I did the best I could. It is pretty hard to say what was the aggregate amount that was realized from the debts and from the sales of stock. Cannot say exactly. Probably $8000—

97 that was the gross amount. There were some
debts of the old firm that had to be paid out of
that being the debts of which A. L. Bancroft
spoke. The amount of these was $3000 I should
think they were not less than $2800 I think.
Those were paid out of the proceeds of those sales
—that consisted of indebtedness that I and my
partner Mr. Sicotte had incurred in getting together this stock. They were firm debts that I
owed at the time Mr. Sicotte sold out to me and
I made a transfer to Bancroft & Co. The busi-
98 ness was continued about 3 months. I drew
about $600 not to exceed that as salary for my
services at the time in carrying on the business.
The other expenses of carrying on the business
were probably $200 or $250 per month for three
months. That would make $750. After the
three months were ended there were some more
expenses, $40 or $50 a month for probably 3
months longer, that would be $150. These ex-
penses were necessarily incurred in the manage-
ment of the business and were reasonable charges
99 for what had to be done. After paying these ex-
penses I got and paid over to Bancroft & Co.
from the sales of these goods and the collection of
those debts about $3000. It was when I had fin-
ished paying over that $3000 to Bancroft & Co.
that the business was closed up. It was not made
in one payment. It was made from time to time.
The business was closed up at the end of three
months. The store was given up, and the goods
were moved away. The goods that were left

100 when the store was closed up were taken to the
store of A. L. Bancroft & Co. They were turned
over by me to A. L. Bancroft & Co. and taken to
their store. Then I sold all the goods, excepting
these that were turned over to A. L. Bancroft &
Co. and taken to their store.

There was quite a portion of the debts collected
after the store was closed up. I then collected all
the debts that I could collect until the business
was closed up. Those amounts of $8000 that
101 were paid for existing debts of the firm. Those
paid to myself $750 and $150 expenses of carry-
ing on the business and the $3000 that I paid
over to A. L. Bancroft & Co. constitute the en-
tire proceeds of the sale of all that stock and the
money collected excepting the amount of stock
and accounts I turned over to A. L. Bancroft &
Co. I don't know whether they collected any
thing after I turned over the books. I turned
over the books at the same time I turned over
the stock. In the sale of that stock I made no
102 bad debts after the assignment. I think not. I
believe all of the stock sold after the assignment
was collected. I think those amounts were all
afterwards paid; if there were any of them bad
debts they may be $100 to $200. I don't think
more than that. I don't know how much I real-
ized from the goods. The books might possibly
show. I have been in the business about three
years. I don't think that if I had sold that prop-
erty at auction instead of selling it in the ordi
nary manner in which I did it would have sold

103 for any more. I don't think it would have sold
for as much. Some of it might have sold for more
but there was a good deal that would not have
sold for anything. Taking into consideration
what it cost to carry on the business, my salary
and rent, I don't think more would have been
realized if the business had been closed and the
property sent to auction. As an offset to expenses
and rent there would have been a good many debts
that could not have been collected after the bus-
iness was closed without a great deal of trouble
104 and expense. I think it made a great difference
to carry on the business in order to collect the
debts. I think if the business had been stopped
other debts that were afterwards collected could
not have been collected. I think on the whole
the course pursued was the most advantageous,
and that more was realized than if the goods had
been sold at auction. The business was closed up
I believe as soon as it was found that it could not
be prosecuted any further to advantage. The
amount of money that I have spoke of was all
105 that was received from the sale of these goods and
the management of this business and all were sold
excepting the property that I transferred to A. L.
Bancroft at the close of three months. I do not
know what was the value of that that was turned
over. A portion of it was some damaged stock
that I expected to return to the parties from whom
I purchased it. They would not take it back as
I expected. At the time when I transferred the
property to them by this agreement there was

106 some stock which was put in at full value but which was nevertheless damaged. It was put in at its full value for the reason that I expected to return it to the parties from whom I received it. They declined to take it back. The amount of those damaged goods was $1700 or $1800; perhaps $2000. It was of very little value in its damaged condition. I suppose it was worth $300 or $400. The larger portion of it was not worth anything, but taken together it was worth $300 or $400.

107 *Cross Examination.*

I believe at the time I purchased the interest of Mr. Sicotte neither he nor I took an inventory of the stock on hand. I am very sure we did not. We used to take an inventory once a month and this was the latter part of the month and I am satisfied that we did not take the inventory. I think we took an inventory on the first of the month before the sale; this sale we made on the 24th, and on the first of October I believe we took the inventory. That was the custom. I
108 cannot state what the stock inventoried at that time; we kept a set of books but the books don't show the stock on hand at that time; we kept a memorandum of the amount of stock on hand in inventories taken every month and filed them; I have no idea where they are now; think some of them, possibly all of them, were turned over with the books to A. L. Bancroft & Co. Probably 2-3 of property assigned was debts due to the firm; probably more; I know that is the way they

109 averaged for six or eight months before the trans-
fer was made ; during the last six months I think
we were in business together the debts due the
firm exceeded the stock on hand and was about
2-3 of the assets of the firm ; for we allowed the
stock to run down ; I think they were about that
at the time I sold out, but I don't know posi-
tively. The amount of stock was about one third.
I collected nearly all the money that was collected
on this outstanding indebtedness at the
time the assignment was made ; after the accounts
110 and books were turned over to A. L. Bancroft &
Co. I believe Mr. Collins collected some ; nobody
collected any money before the books were turned
over except myself. It was all collected under
my supervision ; it was all embraced in this
$8000 ; no sum of money was embraced in that
$8000, except what I collected, nothing that I am
aware of ; I cannot tell what portion of the $8000
was the proceeds of the sale of the property on
hand at the time the assignment was made. My
books show that the debts were more than $3000 ;
111 I know about the amount of the debts paid. I
paid about $3000. I consulted my books a little
yesterday. I paid this indebtedness ; I paid it
all out of the proceeds of this property. After
paying the indebtedness I turned over about
$3000 to A. L. Bancroft. It was turned over
from time to time. I believe there were one or
two inventories taken shortly after the assign-
ment was made. I do not know what the stock
inventoried at that time. The inventory was

112 probably not taken until about the first of the month, six days after the sale was made. I am not sure that one was taken then; I did not look at the inventory when I was looking at the books. I am not able to state the amount of stock taken at that time. I don't know whether the inventory is in existence or not. I went right on with the business making sales after the assignment was made. Between that time and the 14th of Nov. two thirds of the property assigned consisted of debts due the firm.

113

I cannot tell what proportion of the indebtedness collected during the three months after the assignment was made. I presume the books show. I was in the habit of making the entry in the books at the time I made the collections, and my books show fully the amount collected, and when I collected it, and from whom. I kept the books partially, and they were kept partially by a young man in the office; I understand bookkeeping a little. The books have never been posted since the business was done. I kept a ledger and
114 blotter. Those books were turned over to A. L. Bancroft & Co. I think a portion of the sales made after this assignment to A. L. Bancroft & Co. were made for cash. A very small portion of them though. The greater portion of them were made on credit; I sold on 60 and 30 days; I did not collect all of that indebtedness before I turned over the books to A. L. Bancroft & Co. A portion of it was outstanding at the time. There was a portion of them collected afterwards; what we

115 sold the first month was nearly all of it collected when it was turned over; probably one-third of the sales were collected; I did not commence to close out business immediately after the assignment; we commenced probably a month afterwards; after I ascertained that I could not get the security that I expected from Portland; I received the damaged stock from Walker, Newell & Co. of Detroit; I ought to have somewhere the bill of that stock; nearly all of my papers went to A. L. Bancroft & Co. I would not be able to select from
116 those bills the bill of the stock that was damaged; it consisted of part fine cut tobacco and part cigars; the principle damage was in the fine cut chewing tobacco; it was caused by dampness; the tobacco was mouldy; I cannot say whether it was in one bill or not; the tobacco was a long time coming out, and it was damaged in the store when we opened it. We had invoices of damaged goods coming all the time; the tobacco was received before the sale to Bancroft; I had a correspondence with the house about taking the goods back; they
117 said it was not damaged when it left their store. I reside in this city. The expenses of 40 dollars per month after turning over the remaining property to A. L. Bancroft & Co. was for collecting bills I did not collect; I collected a portion of it; after the books were turned over to A. L. Bancroft & Co. I used to go to the store and write up the books, and the man's report of the money that he had brought in; he received $30 per month for collecting; that was his salary; and of course, he

118 had to spend more or less money in making the
collections; a man was employed for that purpose
at a salary; I believe he was paid $30 per month
for that business alone; I think Bancroft & Co.
employed him; I paid Mr. Sicotte $5,000 for his
interest in that property, because I thought at that
time the property was worth it; I supposed at
that time that I should go on with the business;
I thought the interest of Mr Sicotte was $5,000;
his interest was one-half interest; I did not think
his interest in the stock and accounts as the mat-
119 ter then stood was worth $5,000; but he wanted
to go out and would not take less, and I consider-
ed if I could go on with the business I could make
it worth that to me; I thought the good will of
the business was worth something.

In making this estimate of his interest I did not make any separate estimate of the stock and the good will of the business; I don't know the value of the good will of the business at that time; as it turned out it was not worth very much.

120 *Re-direct Examination.*

I was in the habit of going to the warehouse of A. L. Bancroft & Co. after the thing had been turned over to them, and examined the goods, and know how the business was going on, and how they were settled. The loss on the credits after the transfer was made I don't think exceeded $2,000 in the aggregate. A very heavy loss occurred on the credits before the transfer was made; nearly

121 all I sold after I took charge under Mr. Bancroft was sold for credit; a portion of these credits were uncollected at the time I turned it over to A. L. Bancroft; probably two-thirds of the sales that were made during those three months, two-thirds of the credit sales were turned over to Bancroft & Co. Nearly all the sales made were credit sales. A very small portion was for cash. I think nearly all of it was collected; I think there was no material loss on these credits after the business was put in my hands; I was very careful after the
122 transfer. About $3,000 had to be paid of these debts that existed against the firm after Bancroft and Co. took charge; there were some debts existing and which remain unpaid until this day; $1,700 or $1,800 I suppose.

Re-cross Examination.

In making the sales of this property after the assignment I sold most of them at our regular rates of sale; then some few remnants that were
123 sold for less than cost. The greater portion of the stock on hand at that time sold at our regular market rates; all, except some stock turned over to Bancroft & Co. That, I suppose, would not sell at regular rates; in taking the inventory of the stock my basis of valuation was cash price.

Re-direct Examination.

I don't know the real value of the stock turned over to Bancroft & Co. At the time I turned it

124 over in its then condition it was not worth much.
I presume it sold for about what it was worth.
They got more than I expected they would for
some of the damaged stock ; I took a little memo-
randum of the goods as they were all packed and put
in cases as they were sent them. I have no idea where
that memorandum is—I think it was left at the store
among my papers—I don't know that it was. The
testimony of the witness, W. W. Bancroft, that
there were firm debts of the old firm of W. W.
Bancroft & Co. that were paid out of the proceeds
125 of the property assigned to A. L. Bancroft &
Co. was taken under the plaintiff's objection that
it was immaterial and irrelevant. — Objection was
overruled by the Court and plaintiff excepts.

A. C. Dorland was called as a witness for the defendants and testified as follows:—

I am a cashier with A. L. Bancroft & Co. I
was in that capacity acting at the time when this agree-
ment was made, October 24th, 1873, between W. W.
126 Bancroft and your firm of A. L. Bancroft & Co. I
was cognizant of those transactions with W. W.
Bancroft at that time. I don't think I saw the
visible stock of goods at that time, when the agree-
ment was made in the store. I did soon after-
wards. It was shortly afterwards we
took an account of the stock remaining
in the store at that time. I tested it at the time
it was taken. I would go and take different arti-
cles to see if the accounts were correct. Yes, sir,
I may say I tested the whole thing the same as I

127 would in taking a trial balance. I would scan it
over carefully and compare certain quantities, and
if they agreed, I, of course, considered the whole
correct.

[Witness is shown a paper that is the account of stock that was then taken.]

I think so. This is dated November 14th; this
contains everything we had in the store at that
time. The damaged tobacco is put at cost; it is a
little less than $850, the account foots up $3312.
128 I forgot what they realized for the damaged to-
bacco, but I remember I could hardly give it away.
My impression is that it realized less than $75. It
was all musty and mouldy. Mr. W. W. Bancroft
carried on the business for about three months.
He accounted to our house for the proceeds of the
business and the management of it.

He has mentioned the expenses that were al-
lowed—that is his salary and the expenses of car-
rying on the business. These had to be paid out
of the proceeds. Those debts that he says were
129 paid to him, amounted to about $3000, had to be
paid out of the proceeds. The amount was about
$3000 for debts; about $600 and $150 for the
other expenses, making an amount of $4500, that
would leave the sum of $3500.

He turned over to us in addition to that amount to the firm a quantity of stock. My recollection is that that quantity of stock sold for $350. I believe we collected but $150 in debts, making about

130 $500, including sale of tobacco and cigars which we collected.

$3500 was the agregate in round numbers, $3509 was the exact number, and that is all of the net result of that property, including the stock and the debts that he had turned over to Bancroft & Co., in that way as security. All that could go as security. My recollection is that we received the $2300 paid out of the firm notes. It was enough to pay one of the firm notes with
131 interest due. This was within a couple of hundred dollars anyway. The amount that was received, $3500, was only enough to cover the $2300 note, and one of the other notes, with the interest due on both. There is no security for this note now on suit. This is all we realized from the property. In regard to the property itself, and the debts that property that was turned over to me sold for about $3500. It was sold to the best advantage, and for as much as it would bring. I went to a greater portion of the saloon dealers and cigar stands and large hotels, and went round to the wholesale dealers. I spent considerable time.

132

It was sold to the best advantage it could be sold at with great care. I did not sell it in large quantities, but I sold it in small quantities of 1000 or more cigars in order to get as much as I could out of it. We realized about $150 of the debts turned over to A. L. Bancroft & Co., finally we collected nearly all the debts that were created after this paper was created. I might say the entire new in-

133 debtedness after we took it. I don't think there was any loss on that new indebtedness. There was a small amount, I suppose about $200, I went to work and put a new collector in and that as the result $150. We did everything in our power to collect the debts.

Cross-Examination.

That inventory does not embrace the indebtness
134 of the concern—it embraces simply the stock on hand—no part of the indebtedness due the firm at that time, the 14th of Nov. May have been taken a little before Nov. 14th, but when we came to take it off perhaps that was the date. It might have been taken two or three days before. I suppose we couldn't take it in one day. It is miscellaneous stock. I do not understand this business of cigars and tobacco. I would not know the value of stock by looking at it. Those who I say I got to examine the stock inspected it. The books show tobacco returned at different times and worthless,
135 while Mr. Sicotte was then in partnership.

The books show that by merchandise account—worthless returned. These were the books kept during the time Mr. Sicotte was there. It refers to that particular brand of this stock that was damaged. I don't know whether it was the particular stock. It was the same quality of goods. The same brand it could not have been injured in the store.

136 W. W. Bancroft recalled, testified that stock was probably damaged on the way out here. The store was dry. It could not have been damaged in the store. My show that some portion of the stock was damaged at the time of the purchase of Mr. Sicotte's interest. It was probably damaged some time before that; that appears by our books. It was scattered all over the country. It almost ruined my trade long before Mr. Sicotte left. A considerable portion of the stock turned over by Mr. Sicotte to me and by me to A. L. Bancroft
137 & Co. was damaged. I don't know as my books show that any portion of the stock was damaged. Nearly all the sales made of this stock on hand after I went into the management of this business here as the agent of A. L. Bancroft & Co. was made on credit. I collected all that after the store was closed and the goods were sent up to A. L. Bancroft & Co. I was probably two months in collecting the debts. I collected nearly all of it. I collected the greater portion of it after the store was closed and the balance of the goods were sent to
138 the store. I went right on collecting after this final transfer of the remainder of the stock to A. L. Bancroft & Co., and I collected after that the proceeds of the sale of this stock, acting as the agent. The amount collected by me that time was embraced in the gross amount that I collected. The $8000 included all of the cash received for the accounts on hand and the goods sold.

$8000 was all that I received and turned over to A. L. Bancroft & Co. I paid the debts. The

139 money was turned over from time to time as it was collected. I turned over $8000 in coin. Whenever I would make a colletion it would go into the store of A. L. Bancroft & Co.,and when the debts had to be paid I went there and got the money and paid them. I turned over $8000. I paid the debts out of that $8000. I gave them the money first and when I wanted money to pay these debts, I went there and got it. As fast as the money came into the store it was turned ever to them and when
140 it was necessary to pay these debts went there and got the money.

Plaintiff exhibits "A," "B," "C," "D," and "E" are hereto attached and made a part hereof.

The case was then decided by the Court in favor of the defendants and against the plaintiff, and judgment ordered accordingly.

The plaintiff now moves the Court for a new trial and assigns the following grounds for said mo-
141 tion.

First. Insufficiency of the evidence to justify the decision and judgment of the Court.

The plaintiff here specifies the particulars in which the evidence is insufficient:

First. The evidence shows that the note in suit was indorsed by A. L. and H. H. Bancroft in blank before it was delivered to payee and while it was in the hands of the maker, W. W. Bancroft, and

142 after the said endorsement was made, the said note was delivered by the maker to the payee L. A. Sicotte.

Second. It is shown by the evidence that the defendants, A. L. and H. H. Bancroft, were fully secured for their indorsement of the said note by the assignment of the property of the maker mentioned and described in the written assignment—plaintiff's Exhibit "B," and the written guarranty of Anna M. Bancroft—plaintiff's Exhibit "D."

143

Third. The evidence shows that at the time the note in suit was executed, the maker thereof resided and had his place of business in the City and County of San Francisco, and State af California. That before it became due he removed his residence to Virginia City, Nevada, and that at the time it became due he had no residence or place of business in the State of California.

Fourth. The evidence shows that the note in suit was duly presented and payment demanded
144 on the day the said note became due, to wit; on the 24th day of October, 1874, and that on the next business day, to wit: Monday, October 26th. 1874, the said note was duly protested for nonpayment, and that notice of protest was on that day given to the said defendants, A. L. and H. H. Bancroft, that the said note became due Saturday, October 24th, 1874.

Fifth. The evidence shows that at the time the said defendants, A. L. and H. H. Bancroft, in-

145 dorsed the said note they received from the maker thereof an assignment of property under an agreement and undertaking to pay the said note when it became due.

SECOND. Errors of law occurring at the trial and excepted to by the plaintiff.

SPECIFICATIONS.

In permitting the witness A. L. Bancroft to testify against the objections of the plaintiff that the
146 note of $2230.80 had priority of payment and that the agreement of the parties was that it was first to be paid.

2d. In permitting the said witness to testify against the objection of the plaintiff that there were firm debts — debts due from the old firm of W. W. Bancroft & Co. That A. L. and H. H. Bancroft paid out of the money received from the sale of the property and debts collected, which property and debts were assigned to them as se-
147 curity for their liability on the said note. That the said debts so paid by the said defendants amounted to $2800 to $3000.

In permitting the witness W. W. Bancroft to testify against the objection of the plaintiff that there were debts of the old firm that he paid out of the proceeds of the sale of the property and debts assigned to A. L. and H. H. Bancroft, and that the said debts amounted to $2800 to $3000.

148 In denying the plaintiff's motion for judgment on the pleadings, which motion was made on the grounds that the allegation in the plaintiff's amended complaint: "That at the time the said defendants, A. L. and H. H. Bancroft, indorsed the note in suit the maker assigned all his estate to them as security for the amount thereof," was not denied by the said defendants so as to put the allegation in issue.

It is hereby agreed that the foregoing statement
149 is correct, and that the same may be settled without notice.

CARR & TITUS,
Attorneys for Plaintiff.

WINANS & BELKNAP,
Attorneys for Defendants.
A. L. and H. H. Bancroft.

Indorsed: Filed October 23d, 1876.
Thos. H. Reynolds, Clerk,
150 Geo W. O'Niel, Dep. Clk.

Settled and allowed.

R. F. MORRISON,
Dist. Judge.

Dated Oct. 23d, 1876.

151 EXHIBIT "A."

$1250. San Francisco, Oct. 24, 1873.

On the 24 day of October, 1874, at three o'clock P. M. of that day, without grace, I promise to pay to Mr. L. A. Sicotte, or order, Twelve hundred & fifty Dollars, at the Banking House of ....in this City, with interest at the rate of one per cent. per month, from date until paid. Principal and interest payable only in Gold Coin, issued from the Mints of the Government of the United States, for value received.

No....... W. W. Bancroft.

152 (Indorsed) A. L. Bancroft & Co.
L. A. Sicotte.

Presented for payment.
Payment refused.
Protested by me for non-payment this 26th day of October, A. D. 1874.

D. K. Swim, Notary Public.

Plaintiff's Exhibit A.

BODEN, Dep. Clk.

153 [Seal.]

EXHIBIT "B."

Know all men by these presents That I, W. W. Bancroft, of the City and County of San Fran-

154 cisco, party of the first part, for and in consideration of the sum of Eight thousand ($8,000.00) Dollars to me in hand paid by A. L. Bancroft and H. H. Bancroft, composing the firm of A. L. Bancroft & Co., of the same place, parties of the second part, the receipt whereof is hereby acknowledged. Have sold, assigned, transferred, conveyed and set over, and do hereby sell, assign, transfer, convey and set over unto the said parties of the second part.

155 *First:* All my right, title and interest in and to the lease of the building and premises number 324 Clay street in San Francisco aforesaid, bearing date March 1st, 1873, executed and delivered to me by H. McCormick and all rights under the said lease, and subject to the terms and conditions thereof.

Second: All the tobacco and cigars, and stock, office furniture and fixtures, and other moveable articles and all the personal property situated, located, stored or being in or on the first floor of
156 the said building, No. 324 Clay street, and also other goods, wares and merchandise consisting chiefly of tobacco and cigars purchased elsewhere and now on the way to San Francisco and pertaining to the business carried on by me at said premises, No. 324 Clay street, under the firm name of W. W. Bancroft & Co.; also the debts, claims, dues and demands and book-accounts and all other indebtedness due to said firm; also a business wagon now at Steuart's stable on

157 Seventh street and all property of every name and nature whatsoever belonging to me and pertaining to the said business, whether in or on the said premises or elsewhere.

To have and to hold all and singular the property aforesaid unto the said parties of the second part and their assigns forever.

All and singular the above property and its appurtenances is transferred by these presents and is herewith delivered by me to the parties of
158 the second part in pledge for the objects and purposes as follow, to wit :

1st. To secure and indemnify the said parties of the second part from and against any and all loss, damage or injury on account of their liability upon four certain promissory notes of even date herewith made by me for the sum of Twelve hundred and fifty (1250.00) Dollars each, with interest from date at one per cent. per month all in gold coin of the United States, payable respect-
159 ively at six, nine, twelve and fifteen months from this date to the order of L. A. Sicotte and which notes and each of them, the parties of the second part at my request and for my benefit, have endorsed by their firm name of A. L. Bancroft & Co.

2nd. To secure to the said parties of the second part the payment of another certain promissory note of this date for the sum of Two thousand two hundred and thirty Dollars and eighty one cents

160 ($2230.81) with interest thereon at the rate of one and one-half per cent. per month after maturity all in gold coin of the United States, payable to the order of A. L. Bancroft & Co., January 15th, 1874, made by me and delivered to the parties of the second part.

And if all and singular the said several promissory notes aforesaid be paid at maturity then these presents shall be void, and the property hereby transferred and pledged or its value or
161 other or equivalent property shall be returned, retransferred and delivered to the party of the first part; but if said notes or any of them be not paid at maturity, or at the close of the extension hereinafter mentioned, said party of the second part may at once sell and dispose of the said property, or any other property that may have been purchased in the continuation of said business as hereinafter mentioned, according to law as applicable to pledges of property; and out of the proceeds of sale shall pay the whole amount principal
162 and interest of the said promissory notes and each of them then unpaid, whether they shall have matured or not; and all costs, expenses, charges of sale and counsel fees incurred by the parties of the second part; and at any such sale said parties of the second part may become purchasers; and thereupon any surplus of said property remaining in their hands or of moneys derived from said sale and of any book-accounts or other indebtedness from third parties not collected by said parties of

163 the second part, shall be returned, paid, delivered and transferred to the party of the first part.

Provided however that said promissory note for the sum of Two thousand two hundred and thirty 81-100 Dollars shall be extended as to time of payment for sixty days after its maturity, if so requested by the party of the first part.

And provided further that during the pendency of this pledge the said parties of the second part are hereby authorized and requested to continue
164 the said business and to carry on and to conduct the same and for that purpose they are hereby authorized to make business sales of said property in due course and without notice at private sale for the purpose of said business, and with the proceeds thereof and with the moneys of said business to purchase and procure new stock and other property for the purposes of said business, and so far as convenient to make payment of the promissory notes aforesaid.

165 And the said parties of the second part hereby covenant and agree to and with the said party of the first part, in accepting the foregoing pledge with all and singular the terms and conditions thereof.

That at any time during the pendency of the above pledge, upon receiving the mortgage of Mistress Anna Bancroft of Portland, Oregon, upon the real property now owned by her in that place, executed by her to the parties of the second part

166 (in due form to the satisfaction of said parties of the second part) to secure the payment of all and singular the promissory notes aforesaid, or so much of them as shall then remain unpaid, the said parties of the second part will thereupon assign, transfer, pay and deliver to said party of the first part all and singular the property above mentioned as pledged, or its value, or so much thereof as may be remaining and any other property that may have been purchased in the continuation of said business, and all the property of said business.

167

Provided, however, that the said parties of the second part shall in no case be liable to the party of the first part, for losses in conducting said business, or for deterioration in the value of, or for losses of, said property or any part thereof; except in cases of gross negligence or mismanagement on their part, if said parties of the second part shall see fit to continue said buiness.

In witness whereof the said parties to these presents have hereto set their hands this 24th day
168 of October, A. D. 1873.

W. W. BANCROFT,
A. L. BANCROFT & CO.

Signed in presence of
JOSE F. GODOY.

Witnessed the Signature of
A. L. Bancroft & Co.
T. A. C. DORLAND.

169 "Endorsed" Bill of Sale and Pledge, W. W. Bancroft to A. L. Bancroft & Co.

Dated October 24th, 1873.

Plaintiffs Ex. B.

Boden, D. C.

170

PLAINTIFF'S EXHIBIT "C."

Cashier's Office of A. L. Bancroft & Company, Publishers, Manufacturers, Importers, Booksellers and Stationers, Printers, Lithographers, Engravers and Binders.

721 Market Street, San Francisco,

Nov. 23rd, 1874.

171 Mr. H. G. Smith

Dear Sir

Your favor of Nov. 21st is received.

Our relations with Mrs. A. M. Bancroft of Portland, are such, that if we paid you the money for the note past due, for which we are not legally responsible as the note was not protested legally to hold us, we would have no claim on her for the

172 amount thus paid, and consequently she would refuse to pay us.

As all of our endorsements, business accommodations to W. W. Bancroft, were made under Mrs. A. M. Bancrofts written guarantee, you will be obliged to look to the maker of the note for your money.

Yours truly,

A. L. BANCROFT & CO.

173 T. A. C. Dorland.

Dorland Note Letter to Smith.

Plaintiff's Ex. C.

BODEN, Dep. Clk.

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174 EXHIBIT "D."

Whereas it is understood that H. H. Bancroft and A. L. Bancroft doing business under the firm name of A. L. Bancroft and Co, shall by indorsement, recommendation and credit assist W. W. Bancroft in his business transactions whenever it shall be in the power of the said A. L. Bancroft & Co. so to do without injury to their own business.

175 Now therefore, I, Anna M. Bancroft do hereby promise and agree to and with the said A. L. Bancroft & Co., that I will pay to them all damages that may in any way accrue to them by any credit extended to said W. W. Bancroft or any recommendation made for him or any commercial or other paper indorsed for him or any business accommodation whatever extended to him by them.

176 Witness my hand and seal at Portland, Oregon, this 7th day of October, 1872.

(Signed) ANNA M. BANCROFT, [Seal]

Signed in presence of
F. A. BANCROFT.

The above is a true copy.

T. A. C. DORLAND.

177

Endorsed Copy of Mrs. A. M. Bancroft's guarantee to A. L. Bancroft & Co.

178 PLAINTIFFS EXHIBIT "E."

UNITED STATES OF AMERICA,
STATE OF CALIFORNIA,
City and County of San Francisco, } SS

BY THIS PUBLIC INSTRUMENT OF PROTEST,

Be it known, That on this twenty sixth day of October, in the year of our Lord, one thousand eight hundred and seventy four, at the request of
179 The National Gold Bank and Trust Company, holder of the Original note whereof a true copy is on the reverse hereof written, I, D. K. Swim, a Notary Public, in and for the County of San Francisco, State of California, aforesaid, residing therein, duly commissioned and sworn, did this day present said note at the late residence of W. W. Bancroft, in said San Francisco, to a person of discretion having charge thereof, of whom I then and there demanded payment thereof, which was by her refused—no reason given. (Being there
180 informed that said W. W. Bancroft now resides, and has his place of business in Virginia City, State of Nevada, and is not now in said San Francisco.)

The said note was this day first delivered to me.

Whereupon, I the said Notary, at the request aforesaid, did protest, and by these presents do

181 publicly and solemnly protest, as well against the drawer or maker of the said note as against all others with whom it doth or may concern, for all exchange, or re-exchange, damages, costs, charges, and interests, suffered or to be suffered, for want of payment of the said note.

Thus done and Protested, at said City and County of San Francisco, on the day and year aforesaid.

In Testimony Whereof, I grant these Presents
182 under my Signature, and the impress of my Seal of Office, at the City and County of San Francisco, on the day and year first above written.

D. K. Swim,
Notary Public.

[Seal.]

"$1250.

San Francisco, October 24, 1873.

On the 24 day of October, 1874, at three
183 o'clock, P. M., of that day, without grace, I promise to pay to Mr. L. A. Sicotte, or order, Twelve Hundred and Fifty Dollars, at the Banking House of——————, in this city, with interest at the rate of one per cent. per month, from date until paid, Principal and interest payable only in Gold Coin, issued from the Mints of the Government of the United States, for value received.

No.——

W. W. Bancroft."

184 Endorsed :

"A. L. Bancroft & Co."

"L. A. Sicotte."

I, the undersigned, Notary, do hereby certify, that the parties to the note whereof a true copy is above written, have been duly notified of the Protest thereof, by letters to them by me written and addressed, dated on the day of the said Protest, and served on them respectively, in the manner following, viz: On A. L. Bancroft & Co., by de-
185 livering said letter at the place of business of A. L. Bancroft & Co., in said San Francisco, to a person of discretion employed therein ; and on L. A. Sicotte by depositing said letter in the Postoffice at San Francisco, California, addressed L. A. Sicotte, San Francisco, California, postage being pre-paid, that being the last place of residence of said L. A. Sicotte, according to the best information that I can obtain ; all of which was done and served on the forenoon of this 26th day of October, A. D. 1874.

186 In Faith Whereof, I have hereunto signed my name, at the City and County of San Francisco, this twenty-sixth day of October, one thousand eight hundred and seventy-four.

D. K. Swim,
Notary Public.

[Seal.]

Plaintiffs Exhibit E.

Boden, Dep. Clk.

187 Order Denying Motion for New Trial.

[Title of Court and Cause.]

NOVEMBER TERM.

FRIDAY, December 8th, 1876.

Court met pursuant to adjournment.

Present: Hon. R. F. Morrison, Judge.

188 The motion on behalf of plaintiff for a new trial herein was this day argued by counsel for the respective parties hereto and being submitted.

It was ordered by the Court that the said motion to and the same is hereby denied.

To which ruling of the Court, Plaintiff excepts.

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189 Notice of Appeal.

[Title of Court and Cause.]

Please take notice that the plaintiff in the above entitles action hereby, appeals to the Supreme Court of the this State, from the judgement therein made and entered in the said District Court on the 13th day of April, 1876, in favor of said defendants in said action and against said plaintiff, and from the whole thereof: And also

from the order of said Court denying plaintiffs mo-
190 tion for a new trial herein made.

Yours, &c.,
CARR & TITUS,
Atty's. for Pltf.

Dated this 9th day of December, 1876.

To the Clerk of said Court and to WINANS & BELKNAP, Atty's. for Defts.

191 Service per copy accepted this 9th day of December, 1876.

WINANS & BELKNAP,
Atty's. for Defts.

Indorsed.—Filed December 9th, 1876.

THOS. H. REYNOLDS, Clerk.
WM. LEDLIE, Dep. Clerk.

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Stipulation.

[Title of Court and Cause.]

Hereby stipulated that a good and sufficient undertaking on appeal in the above entitled cause has been filed.